

REGULAR meeting of the Board of Equal Rights Commission held WEDNESDAY, APRIL 1, 2009 in Room 301 B of City Hall, Milwaukee, Wisconsin.

PRESENT: George Williams, III
Michael Barndt
Ray Vahey
Renee Taylor
Genyne Edwards
Ivan Gamboa
Chris Her-Xiong

Staff: Maria Monteagudo, Employee Relations Director
Kathy Lalasz, Commission Stenographer
Heidi Galvan, Commission Attorney

The meeting was called to order by Chairperson Williams at 2:06pm.

The minutes of the March 11, 2009, meeting were approved. Commissioner Vahey requested that the list of agencies dealing with equal rights issues be done using excel format if possible and to include a list of community and neighborhood organizations.

(Commissioners Barndt/Vahey, unanimous)

PAID SICK LEAVE ORDINANCE ADMINISTRATIVE RULES

Chairperson Williams announced that the process to review and approve the Administrative Rules would entail a rule by rule review/discussion. This was necessary to ensure that the Commission had ample opportunity to assess each provision prior to the preliminary adoption of the Rules to be sent out for public comment. The Chairperson indicated that the final Rules would be adopted by the Commission after the public comment period.

Ms Monteagudo informed the Commission that the draft of the Rules was on the agenda to be approved so that the public comment period could commence. The Rules were developed to establish the standards and procedures for the implementation and enforcement of the Paid Sick Leave Ordinance. She recommended to the Commission that their review and assessment of the Rules at the meeting be limited to format and clarity and that legal and policy issues be held until after the public comment period. She informed the Commission that the rules had been reviewed by the City Attorney's Office for legality and that Deputy City Attorney Linda Burke and Assistant City Attorney Thomas Miller were available at the meeting to answer questions.

Commissioner Barndt expressed a concern as to whether the draft of the Rules was ready and had enough material to engage the public in a meaningful discussion. He also asked about whether this was the time for the Commission to engage in a more broader discussion. Attorney Galvan reiterated that any issues concerning policy should wait until they hear from the public. Commissioner Taylor asked what the appropriate action for the Commission to take would be at this time. Ms. Monteagudo indicated that the Commission should approve the draft of the Rules as presented so that they can be made available for public comment.

Commissioner Vahey asked if the Commission could at a later date raise issues not raised by the public. Commissioner Williams clarified that individual members of the Commission were encouraged to identify policy and other considerations throughout the public comment period and bring them back to the Commission for further discussion at the May 19th meeting. Moving the rules at this point does not

mean that the Commissioners may not be able to bring a policy issue up at a later time. Commissioner Her-Xiong joined the meeting at 2:15pm.

The Commission proceeded to review the draft of the Rules. Under the definitions, Commissioner Barndt expressed a concern about making reference materials referred to in the rules available to the public either as appendices or links. Ms. Monteagudo indicated that once the final Rules are adopted the staff would provide links on the website as appropriate. Commissioner Williams suggested that staff make available information as to where to find the source of information.

RULE #1

Commissioner Edwards expressed concern about the notice requirement. She wanted to see more details about the notice and the uniformity of notices to be posted by employers. Ms. Monteagudo indicated that the City was planning on developing and distributing the required notice to ensure consistency and uniformity.

Rule #1 was approved. (Commissioners Taylor/Vahey, unanimous)

RULE #2

Commissioner Williams asked if under section 2.2 the assumption was that employees would earn one sick day for about 4 days of work. Attorney Galvan responded in the affirmative. Commissioner Williams also asked if under 2.4, is it assumed that sick leave for large company is 9 days. Ms. Monteagudo clarified that the cap is 72 hours not days and that the rate of accrual is one hour for every 30 worked and it is capped at 72 for large business and at 40 for small business.

Rule #2 was approved. (Commissioners Edwards/Vahey, unanimous)

RULE #3

Commissioner Barndt asked for clarification as to whether the implementation date is the point at which the court discussions end. Deputy City Attorney Burke clarified that if the injunction is lifted there will be an order directing the City when to begin implementing and that will be the implementation date.

Rule #3 was approved. (Commissioners Barndt/Taylor, unanimous)

RULE #4

Commissioner Edwards requested clarification for cases when this rule conflicts with employer policies regarding carryover of sick time and how additional information would be available to resolve the conflict. Ms. Monteagudo indicated that consideration had been given to the potential conflict between this rule and an employer's policy. She further indicated that information received during the public comment period would give the Commission the opportunity to assess potential areas of conflict. Commissioner Barndt responded that his understanding was that employers could provide more generous benefits but not less. Ms. Monteagudo indicated that it may not be as simple as more or less benefits but that employers need to consider if their current policies conflict with other provisions of the Ordinance such as payout provision required under an employer's policy. Ms. Monteagudo indicated that staff would identify opportunity for clarification. Commissioner Vahey noted that there is a provision that authorizes employers to have more generous policies. Commissioner Williams requested information to address how to resolve a conflict if the employer did not have a more generous policy.

Rule #4 was approved. (Commissioners Her-Xiong/Vahey, unanimous)

RULE #5

Commissioner Edwards expressed concern about the vagueness of the reasonableness standard under Rule #5.1. Ms. Monteagudo clarified that the language under 5.1 was directly from the Ordinance and that the rest of Rule #5 was an attempt to clarify the Ordinance and provide guidance and direction as to what the “reasonable standard” is. Commissioner Edwards noted that she was hoping to get clarification as to what unreasonable barriers may refer to. Ms. Monteagudo suggested that the Commission consider the information received during the public comment period and identify some examples of barriers that may exist to try to incorporate into the rules.

Commissioner Barndt indicated that he felt that Rule #7 added more clarification to the issue. Ms. Monteagudo suggested that the Commissioner attempt to think of examples of the type of provisions that should be included to further clarify this language.

Commissioner Barndt raised the issue as to whether there is an intent to develop rules that are open and flexible enough to allow a specific situation to be weighted using the Commission’s best judgment as opposed to attempt to have a rule for every potential situation that may arise. Ms. Monteagudo noted that it would be naïve to assume that rules could be developed to address all potential scenarios that will come up. The Commission should strive to come up with general standards that can be used to implement and enforce the Ordinance and when there are complaints the Commission should consider all factors, including mitigating circumstances and render a decision. If and when needed, the Commission may wish to amend rules based on complaints and decisions that are made.

Commissioner Barndt asked if under 5.7 there is a standard expectation of the supremacy of state and federal law and whether this provision is original language from the Ordinance. Ms. Monteagudo responded that there is language in the Ordinance that addresses that particular provision and deferred to Assistant City Attorney Miller who indicated that there is a provision that states that the Ordinance cannot be construed in a way that violates any state or federal laws. He indicated that there will be areas of overlap between the Ordinance and other federal or state employment laws and that the FMLA is one of them. For example, an employee’s absence may be eligible for paid leave under the Ordinance and may also be an FMLA qualifying event and there the state and federal law regarding notice is going to apply.

Commissioner Barndt requested information to address the scenario of the state passing a weaker sick leave law and the impact on the Milwaukee Ordinance. Assistant City Attorney Miller responded that it would depend on the text of the state statute as there are examples where the legislature acts but leaves room for municipalities to do more and the statute provides a foundation from which municipalities can act.

Rule #5 was approved. (Commissioners Taylor/Vahey, unanimous)

RULE #6

Commissioner Edwards noted there were two provisions listed as 6.3 and Commissioner Vahey noted a typo under 6.2.

Rule #6 was approved. (Commissioners Vahey/Barndt, unanimous)

RULE #7

Commissioner Barndt suggested that the rules should provide to the extent possible a summary of medical privacy laws so that the public can understand the basis of the rule. Ms. Monteagudo responded that the staff would consider providing some general guidance as to where those laws could be found but it would be difficult to compile an exhaustive list to use for reference. She further indicated

that employers have a responsibility to comply with those regulations outside of the requirements under the Ordinance.

Commissioner Vahey expressed concern that under Rule #7.5 the requirement to provide documentation of a general nature for instances when employees take time off to attend medical appointments would be used by insurance companies to deny benefits or impact insurance coverage. Commissioner Barndt noted that Rule #7.7 provides clarification in terms of the employers' responsibility to protect medical information under federal and state laws.

Rule #7 was approved. (Commissioners Vahey/Taylor, unanimous)

Commissioner Williams stated that the Department should be available to provide information if and when requested in relation to privacy laws and that individuals must understand their obligation to seek information or obtain clarity.

RULE #8

Commissioner Barndt expressed concern with the reference to "emergency" under Rule #8.1(a) and suggested identifying alternative language for that provision. He also recommended seeking clarification to Rule #8.2 to include that denial of the benefit for instances where there is evidence of abuse does not mean that the benefit is denied permanently.

Rule #8 was approved. (Commissioners Her-Xiong/Edwards, unanimous)

RULE #9

Rule #9 was approved. (Commissioners Taylor/Vahey, unanimous)

RULE #10

Rule #10 was approved. (Commissioners Barndt/Her-Xiong, unanimous)

Commissioner Gamboa noted the need to possibly amend Rule #10 to extend the period of time when records need to be retained given employees who work in and out of the City. A motion was made to reconsider language based on Commissioner Gamboa's observation.

(Commissioner Edwards/Barndt, unanimous)

RULE #11

Commissioner Barndt suggested including references about other laws that deal with sexual assault issues.

Rule #11 was approved. (Commissioners Vahey/Her-Xiong, unanimous)

RULE #12

Rule #12 was approved. (Commissioners Barndt/Vahey, unanimous)

RULE #13

Rule # 13 was approved. (Commissioners Taylor/Vahey, unanimous)

Commissioner Edwards suggested adding a definition for "replacement worker".

(Commissioners Barndt/Vahey, unanimous)

RULE #14

Rule #14 was approved. (Commissioners Vahey/Her-Xiong, unanimous)

RULE #15

Commissioner Barndt noted that employers have the opportunity to provide more generous benefits than required by the Ordinance.

Rule #15 was approved. (Commissioners Barndt/Her-Xiong, unanimous)

RULE #16

Rule #16 was approved. (Commissioners Barndt/Taylor, unanimous)

RULE #17

Commissioner Barndt noted that the rule should address whether organizations belonging to a franchise should be treated as independent entities for purposes of the Ordinance.

Rule #17 was approved. (Commissioners Vahey/Barndt, unanimous)

RULE #18

Rule #18 was approved. (Commissioners Edwards/Taylor, unanimous)

RULE #19

Commissioner Barndt suggested adding clarifying language about employer responsibilities to notify employees and tracking hours. Commissioner Gamboa asked about a situation where a company is bought out by another company and the impact on the accrued time earned by employees.

Rule #19 was approved. (Commissioners Gamboa/Edwards, unanimous)

Commissioner Williams asked Deputy City Attorney Burke to address the question about a company that has been bought out by another company and the impact on paid sick leave benefits. Commissioner Williams noted that under the circumstances it is important to understand that when there is a new employer the former employer obligations are not maintained.

RULE #20

Commissioner Barndt asked for clarification on the definition of PTO and how employers use their PTO to comply with the Ordinance. Commissioner Edwards noted that more clarification is needed. Commissioner Vahey agreed as he thought that some individuals would have difficulty reconciling existing policies with paid absences due to illness. Ms. Monteagudo noted that it was important for employers to understand that assuming that having a PTO policy is enough to comply with the Ordinance is misleading as they also need to comply with other provisions of the ordinance such as notification, reinstatement and carryover provisions.

Rule #20 was approved. (Commissioners Barndt/Vahey, unanimous)

RULE #21

Rule #21 was approved. (Commissioners Barndt/Taylor, unanimous)

RULE #22

Commissioner Barndt asked if some of the PSLO rules may be modified by FMLA provisions. Ms. Monteagudo noted that there may be conflicts between some provisions of FMLA and the Ordinance. The City is not enforcing those laws. Assistant City Attorney Miller explained that the rule is there to inform the employers of their obligations. While there may be overlap between a need for paid sick leave and an FMLA qualifying event, the rule is there to state explicitly for the employers information than nothing in the Ordinance is going to be read to conflict with any of the employer rights

under the federal or state FMLA to designate time off that is used for the purposes of this Ordinance as also counting against the employee's bank of FMLA time. Ms. Monteagudo also clarified that a key difference is that to be eligible for state or federal FMLA employees must work a certain number of hours and under the PSLO employees start accruing the benefit immediately and have access to paid leave after 90 days. There are areas where there are no overlaps and employers have to comply with all of them.

Rule #22 was approved. (Commissioners Taylor/Her-Xiong, unanimous)

RULE #23

Commissioner Barndt noted that additional information and discussion is needed to understand the role the Commission will play in processing complaints as well as the role and responsibility of an Administrative Law Judge and staff. He noted he was not sure of the impact of the rule on the workload of the Commission and the ability to work with other community resources to support the work of the Commission.

Rule #23 was approved. (Commissioners Barndt/Taylor, unanimous)

RULE #24

Commissioner Barndt requested information as to how individual violations are counted, the definition of a willful violation and what flexibility in general is there for applying a formula because the language is not clear. Ms. Burke clarified that the language is directly from the Ordinance. Commissioner Barndt inquired about whether the Commission has an option to modify language from any other Ordinance. Deputy City Attorney Burke noted that Chapter 109 language had been in the books for many years and that additional information could be made available by the Department of Employee Relations or the City Attorney's Office.

Commissioner Vahey wanted additional information in cases where a pattern of violations is identified and how this rule would apply. He noted an example of an employer with multiple violations and whether the forfeiture would be applied to the number of violations or the number of employees. Ms. Monteagudo informed the Commission that staff would attempt to clarify rule to address questions raised.

Rule #24 was approved. (Commissioner Edwards/Gamboa, unanimous)

The Commission took a break at 3:35 and the meeting was called to order at 3:40.

PSLO ADMINISTRATIVE RULES PUBLIC COMMENT PERIOD /STRATEGIES

Ms. Monteagudo informed the Commission that the draft of the rules as received by the Commission had been posted on the website and that all 450 subscribers to the E-notify system had received an email about the rules being posted and about the public comment period. She indicated that depending on the actions of the Commission at today's meeting, information would be posted about the timeline of the public comment period as well as information about the date, time and location of the public hearing.

Commissioner Williams indicated that the public hearing will be held on 040809 at 6pm at 3850 N 35th Street at the Department of Public Works Field Headquarters Office. He noted that as a Chairperson he will set the guidelines for how to proceed at the hearing. The hearing will not be a debate but an opportunity to hear testimony about how to make the Ordinance work, not about the merits of the Ordinance itself.

The first Public Hearing was set for 040809 and the second tentative date for a second hearing originally scheduled for 042909 was changed based on the timeline for the public comment scheduled to end on 042409. The date for a potential second public hearing was set for 042209. The decision to hold this meeting will be made on 040809. The next regular meeting of the ERC is scheduled for 051909.

The Commission discussed the amount of time to be allowed for testimony and agreed to limit testimony to two or three minutes per person depending on attendance. The Commission noted that if it is possible the time frame would be expanded to allow individuals to express their concerns for a longer period of time and that all other venues to submit statements or questions should be clearly communicated. A process to make the comments public was discussed as some felt that it would serve the process well. Ms. Monteagudo expressed concern about making all comments or statements submitted for the ERC's consideration public record as there might be individuals who submit statements via email or regular mail who are not anticipating those statements to be made public.

Commissioner Williams suggested that comments submitted by individuals via email or regular mail be for the review of the Commissioners and not for the public record and that comments submitted at the public hearings would be part of the public record. Commissioner Vahey agreed that people who send off comments via email and mail are entitled to privacy. Ms. Monteagudo noted that under public records laws any and all comments may have to be disclosed but that is different from making all comments public without such a request.

Commissioner Taylor indicated she thought that a stenographer would be available at the public hearing. Ms. Monteagudo indicated that staff would be available at the public hearing to take notes and create a record of the testimony but that minutes would not be available.

Commissioner Barndt suggested that participants should be informed of all the venues available to submit comments and should be encouraged to come with prepared statements. Commissioner Williams noted that the Commission will accept oral testimony at the hearing.

Commissioner Barndt indicated that in the long term the Commissioner should consider being more open about establishing a dialogue and interactive process on other ERC issues.

Ms. Monteagudo notified the Commissioners that a process had been identified to provide a secured single user website for Commissioners to access written feedback and instructions will be provided on how to access during the week of April 6th.

Commissioner Taylor proposed that any notices informing the public about the public comment period include language strongly encouraging people to provide written statement. Commissioner Barndt wants to make sure the Commission highlights the difference between language from the ordinance and language from the rules and remind individuals that a more effective approach would be to seek clarification from a particular rule instead of attacking the rule directly.

A motion to move the second tentative public hearing date from 042909 to 042209 meeting was made by Commissioner Barndt and seconded by Commissioner Gamboa. Commissioner Gamboa will identify potential south side locations for the public hearing and will notify staff accordingly. The motion was amended to have the 042209 public hearing date based on need and that the decision will be made on 040809.

Commissioner Vahey requested that list will include community and neighborhood agencies be made available to him and Commissioner Edwards.

There being no further business, the meeting adjourned at 4:10 p.m.

(Commissioners Vahey/Taylor, unanimous)

ATTEST:

GEORGE WILLIAMS III
PRESIDENT

MARIA MONTEAGUDO
DIRECTOR, DER